United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 17, 2003

TO : Roberto G. Chavarry, Interim Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sauber Painting, Inc.
Cases 13-CA-40097, 40373, 40383

This Bill Johnson's[1]/BE & K[2] Section 8(a)(1) matter was submitted as to whether the Employer unlawfully filed a state court lawsuit against the Painters and an amended suit against the Painters and the other Unions for tortious interference with business relationships, defamation, intentional infliction of emotional distress, and conspiracy.

We conclude that the original lawsuit and the amended complaint were not baseless under state law, were not preempted, and were not otherwise filed with a cost-imposing retaliatory motive. Accordingly, the Region should dismiss the charges, absent withdrawal.

FACTS

The Employer is a painting contractor, whose painting employees are represented by the National Production Workers Union Local 707 (Local 707). Their labor contract contains a wage rate for painters. In early January 2002,[3] the Employer and Local 707 filed Section 8(b)(4) charges against Painters District Council 30 (Painters), alleging that the Painters' picketing, ostensibly for area standards purposes, coerced and induced neutral employers to cease doing business with the Employer. On January 22, the Region informed the parties that there was reasonable cause to believe that the Painters had violated Section 8(b)(4)(B). Complaint issued on January 31; the matter settled on April 2.

Meanwhile, on January 23, the Employer and its president, Bob Sauber, filed a three-count Illinois state court suit against the Painters and several of its agents,

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[1] Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983).

[2] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[3] All dates are in 2002 unless otherwise indicated.

alleging tortious interference with prospective business relationships, defamation, and intentional infliction of emotional distress, and seeking injunctive relief and damages. The verified complaint alleged, and Sauber also testified, that the Painters had harassed Sauber personally by following him on personal errands, parking a "rat mobile" outside his house at all hours bearing the painted words "stop infectious diseases," picketing his home, verbally threatening him, and making threatening phone calls to his house. According to the pleadings and testimony, one of the Painters' agents had described the actions as a "personal vendetta" against Sauber.

The suit was removed to federal district court by the Painters on February 28 on the ground that the suit was preempted by federal law; however, the federal court remanded the suit to the state court on May 22. On April 4, Painters filed the first of the instant charges, alleging that the suit violated Section 8(a)(1). On April 30, the Region decided to hold the charge in abeyance, pending the outcome of the litigation.

On July 1, the Painters picketed a construction jobsite at which employees of the Employer, along with employees of other employers who were represented by other Unions,[4] were working for a general contractor. The picket signs referred to the Employer's purported failure to pay area standard wages and benefits. The employees of the other employers represented by the Unions walked off the job; business agents of those other Unions told the general contractor that they would not resume work until the general got rid of the Employer. The general contractor terminated its subcontract with the Employer.

On July 16, the Employer filed its Amended Complaint restating the existing claims against the Painters and its agents, but also adding an allegation that the Painters and the other Unions tortiously interfered with, and conspired to tortiously interfere with, the Employer's contract by the July 1 picketing and work stoppage. The Plumbers and Sheet Metal Workers then filed the other two instant charges, alleging that the amended suit naming them violated Section 8(a)(1); the Region decided to also hold those charges in abeyance.

On July 30, the Employer filed for and obtained a temporary restraining order against the Painters and the other Unions, enjoining them from surveilling, following, or threatening Bob Sauber. That TRO expired on August 12,

[4] Plumbers Local 93, Sheet Metal Workers Local 265, and others.

and the Employer's request for a preliminary injunction was denied. On August 22, the Plumbers and Sheet Metal Workers filed motions to dismiss the amended complaint as to them; on November 8, the state court granted those motions and dismissed the proceeding as to all of the defendants except the Painters. On January 14, 2003, the Employer voluntarily dismissed the entire suit against the Painters, assertedly for undefined reasons other than a lack of merit.

ACTION

We conclude that the original lawsuit and the amended complaint were not baseless under state law, were not preempted, and were not otherwise filed with a cost-imposing retaliatory motive. Accordingly, the Region should dismiss the charges, absent withdrawal.

I. BE & K/Bill Johnson's Standards

In BE & K, the Supreme Court rejected the Bill Johnson's standard for adjudicating ultimately unsuccessful but reasonably based lawsuits.[5] The Court reasoned that the Board's standard was overly broad because the class of lawsuits condemned included a substantial portion of suits that involved genuine petitioning.[6] The Court thus indicated that the Board could no longer rely exclusively on the fact that the lawsuit was ultimately meritless but must determine whether the lawsuit, regardless of the outcome, was reasonably based.[7]

Because the Supreme Court in BE & K did not articulate the standard for determining whether a completed lawsuit is baseless, the Bill Johnson's standard for evaluating ongoing lawsuits remains authoritative. The Bill Johnson's Court, in discussing the above standard for ongoing lawsuits, stated that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts so as

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[5] BE & K, 536 U.S. at 527-528, 532 ff.

[6] Same, at 533-534.

[7] Same, at 535-537. The Court left open the possibility that an unsuccessful but reasonably based lawsuit that would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome," may be an unfair labor practice. Same at 536-537.

to usurp the fact-finding role of the jury or judge.[8] Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."[9] Thus, even after BE & K, a lawsuit is baseless if it presents unsupportable facts or unsupportable inferences from facts and if it presents "plainly foreclosed" or "frivolous" legal issues.

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."[10] The Court viewed the Board as having adopted a standard in reasonably based suits of finding retaliatory motive if the lawsuit itself related to protected conduct that the petitioner believed was unprotected. The Court criticized this standard in non-meritorious, but reasonably based, cases.[11] Similarly, the Court reasoned that inferring a retaliatory motive from evidence of antiunion animus would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"[12]

Significantly, while the Supreme Court in BE & K rejected the Board's standard of finding a lawsuit retaliatory solely because it is brought with a motive to "interfere with the exercise of protected [NLRA Sec. 7] rights,"[13] the Court limited its holding to reasonably-based lawsuits. Indeed, the Court, at the outset of its retaliatory motive discussion, pointedly noted that the issue presented was whether the Board

> may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless (emphasis added).

Then, in discussing retaliatory motive, the Court referred only to reasonably-based suits:

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[8] 461 U.S. at 744-46.

[9] Same, at 746-47.

[10] BE & K, above, at 533.

[11] Same, at 533-534.

[12] Same, at 534 (emphasis in original).

[13] Same, at 533.

> If [a plaintiff's] belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning."[14]

Thus, even after BE & K, the analysis of retaliatory motive as to baseless lawsuits continues to be that set forth in Bill Johnson's, and the cases applying Bill Johnson's.

II. The Lawsuit Was Not Unlawful

A. Not Baseless in Fact or Law

We agree with the Region that the Employer's lawsuit was not baseless in law or fact.

Illinois law recognizes such torts as defamation, tortious interference with business relationships, and intentional infliction of emotional distress.[15] The Employer and Sauber's lawsuit appears to be sufficiently well pled under that law as to be not baseless. The Employer and Sauber's suit also asserts factual bases for their allegations, both in the verified complaint and by other testimony such as that Painters' agents falsely told a contractor that the Employer was having "tax problems" and the "rat mobile['s]" legend of "stop infectious diseases" implied that Sauber had an infectious disease;

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[14] Same, at 533-534.

[15] See, e.g., Krasinski v. United Parcel Service, 530 N.E.2d 468 (Ill. 1988) (defamation requires a false statement, unprivileged publication to a third party, and damage to the plaintiff); Lowe Excavating v. IUOE Local 150, 327 Ill.App.3d 711, 723-24 (Ill. App. 2002), appeal denied 199 Ill.2d 557 (2002)(table), cert. denied 537 U.S. 1028 (2002) (suit alleged tortious interference with contract, negligent interference with economic advantage, and trade libel, based on purported area standards picketing; court found picketing constituted malicious defamation where employer paid prevailing wages, but dismissed other causes of action for failure to preserve dismissal on appeal; see also Lowe Excavating v. IUOE Local 150, 327 Ill.App.3d 711, 723-24 (Ill. App. 1989)(defamation claim and tortious interference claims not preempted)); Fellhauer v. City of Geneva, 568 N.E. 870, 878 (Ill. 1991) (tortious interference with prospective business advantage requires defendant's knowledge of expectancy, purposeful interference therewith, and damages).

that the Painters' picketing coerced a contractor into not awarding the Employer further contracts; and that Painters' agents followed, harassed, and threatened Sauber. The amended complaint's allegation that the July picketing was tortious stated that the picketing was a continuation of the Painters' tortious conduct, and based its conspiracy claim against the other Unions on evidence that the other Unions walked off the job when the Painters picketed and told the general contractor that they would not resume work until the general got rid of the Employer; this allegedly demonstrated an agreement with the Painters to interfere with the Employer's contractual relations. The Employer's assertions of such facts appear to provide a basis for the claims that the defendants' conduct was tortious.[16] Accordingly, we cannot say that the lawsuit is baseless in state law or fact.

B. Not Baseless On Preemption Grounds

The lawsuit was also not baseless as preempted under Brown v. Hotel Employees, 468 U.S. 491, 502 (1984). In Brown, the court held that if conduct is actually protected by a federal statute such as the NLRA, state law that purports to regulate it is preempted not as a matter of the primary jurisdiction of the Board but as a matter of substantive right. The Board has found lawsuits to be unlawful as preempted under Brown where the lawsuits clearly attacked conduct which was actually protected by the Act.[17]

The lawsuit here attacks the Painters' dispute with the Employer and its president Sauber. Such alleged action as picketing Sauber's home and following him may have been protected, or may have been conducted in such a manner that it was unprotected or that any Section 7 protection was lost by the tortious conduct alleged by the Employer. Resolution of whether the Painters' and the other Unions' conduct was protected under Section 7 turns on factual and credibility disputes. Since the lawsuit thus does not

[16] See Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 962-3 (2000) (although the Board's inquiry into baselessness need not be limited to a lawsuit's bare pleadings, the Board must refrain from making credibility determinations or drawing inferences from disputed material facts, which would usurp the fact finding role of the courts).

[17] See Manno Electric, Inc., 321 NLRB 278 (1966), enfd. mem. 127 F.3d 34 (5th Cir. 1997); Associated Builders & Contractors, Inc., 331 NLRB 132 (2000).

clearly encompass actually protected activity, it is not preempted under Brown.

Neither was the lawsuit baseless as preempted under San Diego Building Trades Council v. Garmon.[18] In Garmon, the Supreme Court held that when "it is clear or may fairly be assumed that the activities which the state purports to regulate are protected by Section 7 ... or [prohibited] by Section 8," or even "arguably subject" to those sections, the state and federal courts are ousted of jurisdiction, and "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." In Sears, Roebuck & Co. v. Carpenters,[19] the Supreme Court further clarified the situation in which states could regulate conduct which was only arguably protected by the Act. In Sears, the Supreme Court held that a state was free to regulate arguably protected conduct "when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so," provided the exercise of state jurisdiction would not "create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct." 436 U.S. at 202, 203.

In Loehmann's Plaza, 305 NLRB 663 (1991), the Board held that when the conduct the state is attempting to regulate merely constitutes "arguably" protected activity, preemption occurs only upon Board involvement in the matter. The determination to become involved in a matter is made by the General Counsel who, before issuing a complaint, must conclude that "sufficient evidence has been presented to demonstrate a prima facie case." 305 NLRB at 670. If the Board becomes involved by the General Counsel's issuance of a complaint, the state proceeding involving the same matter is preempted pending resolution of the Board proceeding and the plaintiff in the state suit must take affirmative action to stay the court proceeding within 7 days of the issuance of the complaint. Loehmann's Plaza, 305 NLRB at 671; Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1178 (D.C. Cir. 1993) (agreement with the Loehmann's standard that Garmon preemption occurs upon issuance of ULP complaint).

We assume, for the sake of argument, that the Employer's lawsuit attacked either arguably protected activity or, in the case of the picketing upon which a

[18] 359 U.S. 236, 244-245 (1959).

[19] 436 U.S. 180 (1978).

Section 8(b)(4) complaint originally issued, arguably prohibited conduct. We nevertheless conclude that the lawsuit was not preempted under Garmon because, under Sears/Loehmann's, Garmon preemption occurs only upon continuing Board involvement. After the settlement of the original 8(b)(4) charge on April 2, 2002, the Board could no longer resolve whether the Painters or other Unions had engaged in protected or prohibited conduct, the basis for Garmon preemption. The Painter's original Section 8(a)(1) charge attacking the Employer's suit was not filed until April 4, and the other Unions' charges were filed later, so the issue of whether the suit was preempted was not raised until a time when there was no longer a pending complaint allegation involving any Union conduct. While the Employer could have filed a new Section 8(b)(4) charge against the Painters for their later July 1 picketing (and against the other Unions for their walkout), sought reinstatement of the original 8(b)(4) charge because of noncompliance with the settlement agreement, and thereby provide a possible basis for Garmon preemption, it did not and is now barred from doing so under Section 10(b). Absent continuing Board involvement, the Employer's lawsuit was not preempted under Garmon.

C. Not Otherwise Unlawfully Retaliatory

Finally, we concluded that the non-baseless lawsuit was not unlawfully retaliatory because there is insufficient evidence that it was filed solely to impose the costs of litigation. In BE & K, Justice O'Connor stated that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if a litigant would not have filed it "but for a motive to impose the costs of the litigation process, regardless of the outcome."[20] We have applied the "impose-costs" standard in cases where a lawsuit could not be said to be baseless.[21] Here, there is no evidence that the Employer filed the suit without any regard for its outcome. The Employer instead filed the suit in a clear attempt to stop what the Employer deemed unprotected and tortiuous conduct. Thus, the Employer's

[20] BE & K, above, at 536-537. See also same at 539 (Breyer, J., concurring).

[21] See, e.g., Aegis Fire Systems, Case 32-CA-19574-1, Advice Memorandum dated November 27, 2002, at 2-3; Dilling Mechanical Contractors, Case 25-CA-25094, Advice Memorandum dated December 11, 2002, at 7 and n.25; and Stonegate Construction, Inc., Case 20-CA-30724-2, Advice Memorandum dated January 23, 2003, at 12.

lawsuit was not unlawful, and the Region should dismiss the charges, absent withdrawal.

B.J.K.